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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Implementation of Section 309(j) of the)	MM Docket No. 97-234
Communications Act - Competitive)	
Bidding for Commercial Broadcast and)	
Instructional Television Fixed)	
Services Licenses)	
)	
Reexamination of the Policy)	GC Docket No. 92-52
Statement on Comparative)	
Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process to)	
Expedite the Resolution of Cases)	

REPLY

Irene Rodriguez Diaz de McComas ("McComas"), by her attorneys, replies to the Comments Filed By Rio Grande Broadcasting Company ("Comments") in this proceeding, initiated by the Commission through a Notice Of Proposed Rulemaking, FCC 97-397 ("NPRM").

1.

PRELIMINARY STATEMENT

1. Rio Grande Broadcasting Company ("RGB") is one of four mutually exclusive applicants for a Class A channel in Rio Grande, Puerto Rico (within the San Juan urbanized area). The Comments plainly are designed to advance RGB's competitive position in the Rio

Grande proceeding, but RGB has filed the Comments without serving the other parties to this proceeding, which impropriety McComas will address under separate cover. At this juncture, it is sufficient to observe that RGB's contentions are self-serving, sterile and, ultimately, of no use to the Commission in this broad-gauged rule-making proceeding. Specifically, the Comments largely duplicate RGB's contentions before the Commission en banc, in the Rio Grande comparative proceeding, while the instant rulemaking deals with across-the-board policy questions, including expedited dispatch of the Commission's business. Put otherwise, the Comments are not properly before the Commission in this rulemaking proceeding.

2. This is pointed up by the Comments' failure to address, in whole or in part, specific questions upon which the NPRM invites comment. Thus, RGB fails to address, as requested by paragraph 13 of the NPRM, whether the Commission has authority to dispose of mutually exclusive applications other than through auctions. RGB also essentially fails to heed paragraph 21 of the NPRM:

"... Those commentators advocating continued use of comparative hearings for mutually exclusive applications pending before July 1, 1997 should explain how their proposed [comparative] criteria would be implemented in an administratively workable and judicially sustainable manner and demonstrate how the proposed criteria would predict good or better service or serve some independent public interest goal." (Emphasis added.)

3. Resolution of these two issues is necessary to determine whether pre-July 1, 1997 conflicting applications may be decided other than by auction, and if so, whether the applications should be resolved by auction, as the NPRM proposes, or by comparative hearings, with their multi-faceted warts. RGB's on balance silence on these matters strongly supports the conclusion that (A) the Commission lacks authority to revert to

comparative hearing proceedings, and (B) any such reversion would do violence to the public interest. These conclusions derive overwhelming support from review of apposite history, law and policy in this area, set out in Part II hereof.

II.

ARGUMENT

A.

**The Commission Is Required To Resolve
Broadcast Mutual Exclusivity In All Cases By Auction**

4. RGB asks for comparative hearing disposition of the Rio Grande proceeding, without, as noted, addressing the issue of empowerment - which is an open issue in the Commission's opinion (NPRM, par. 13). McComas, however, submits that the Balanced Budget Act of 1997 categorically forecloses and forbids hearings, superseding such proceedings with auctions. Any doubts on this score are rooted in semantics, but semantics must yield to the sense of the Conference Report:

"New Section 309(b) requires the Commission to use competitive bidding to resolve any mutually exclusive applications for radio broadcast licenses that were filed with the Commission prior to July 1, 1997. ("Emphasis added.") (U.S. Code - Congressional and Administrative News (No. 7) September 1997, p. 194.)

The Conference Report's language is express, explicit and unbending, and should be respected, relegating comparative hearings to the history books.

B.

**As A Matter Of Sound Policy The Commission Should
Resolve Cases Of Broadcast Mutual Exclusivity By Auction**

5. Assuming, as a theoretical matter, that the Commission has latitude to decide that pre-July 1, 1997 mutually exclusive applications are grist for comparative

hearings, the Commission nonetheless should exercise its administrative discretion to supplant hearings with auctions - for the reasons set out in paragraphs 14 - 19 of the NPRM and also because orderliness, timeliness, finality, fairness and equity thereby will be served. These goals cannot be achieved in the absence of standards, and unfortunately the Commission has been unable to formulate legally sustainable standards, for over five years, following invalidation of the Commission's integration policy - and no end is in sight, among other reasons, because the NPRM cites the obsolete factor of "diversification" as likely to have comparative relevance, notwithstanding the 1996 amendments to the Communications Act, and the Commission's indifference to local concentrations of control. In the instant "relevant market" of San Juan, eight stations can be under common control and the Commission routinely endorses such concentrations without conducting meaningful, if any, anti-trust analyses. Thus, Commission reliance on "diversification" would be no less "arbitrary" than the Commission's prior reliance on integration, and the Commission's reliance on diversification would result in prolonged litigation in case-after-case, including specifically the Rio Grande proceeding. Such prospective litigation would waste Commission resources, delay new service to the public, and exhaust litigants.

C.

Fairness and Equity

6. The NPRM recognizes the need for fair play in this matter and RGB seeks to capitalize thereon, arguing that all four applicants have equities flowing from their hearing costs and their imputed expectations of ten years ago (1988), when the Rio Grande applications were filed in response to a cut-off list (Comments, par. 15). However, RGB's claims are facially defective - only United Broadcasting Company joined with RGB in

requesting the Commission to revert to hearings. As the NPRM (par. 14) notes, " ... applicants have no vested right to a comparative hearing ..." and RGB's Comments present no evidence, i.e., corporate minutes, company records, contemporary correspondence that RGB filed its application, because it believed - in 1988 - that its application would be resolved exclusively on the basis of the "standard comparative issue". Indeed, RGB's so-called "expectations" constitute no more than post-hoc rationalization, given that RGB could not forecast its competitors and their comparative attributes at the time of filing, so RGB had no reason to look to hearings for disposition of its Rio Grande application. Moreover, there are multiple other good reasons, for rejecting RGB's "expectations" claim as hollow, namely:

A. For at least 30 years prior to 1998, auctions had been mentioned in the trade press as an alternative to hearings - Broadcasting, February 24, 1958, p. 200, referred to "... A proposal that 'television franchises' be awarded to the highest bidder ... "

B. Prior to 1998, lotteries also were broadly known as potential alternatives to hearings.

The upshot is that RGB's ostensible "Great Expectations" are unsupported - and insupportable - and an auction procedure would be fair to RGB. At any event, any auction procedure would be fair, in context, because auctions will expedite new service.

III.

CONCLUSION

7. Auctions are required for resolution of all conflicting broadcast applications but, assuming the Commission has discretion in the premises, auctions must be

adopted as a matter of discretion in order to facilitate the prompt dispatch of Commission business and to bring new service to the public.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ANNA McNAMARA, a secretary in the law offices of Robinson Silverman
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